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Supreme Court of the United States

October Term, 1963

No. 572

JESSE JAMES ARNOLD and GEORGE DIXON,
Petitioners,

vs.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF THE STATE OF NORTH CAROLINA

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INDEX

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Summary of Argument 2

Argument 3

A. There is not sufficient evidence of systematic and purposeful exclusion of members of the colored race from service on the grand jury 3

B. There is no constitutional question presented on this record as to the refusal of the Court to continue the case and allow a mental examination by private psychiatrist 6

Conclusion 9

Appendix 11

TABLE OF CASES

Aikens v. Texas, 325 U. S. 398, 89 L. ed. 1692 6

Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454 8

Brown v. Allen, 344 U. S. 443, 97 L. ed. 469, 73 S. Ct. 397 5

Davis v. Texas, 139 U. S. 651, 35 L. ed. 300 9

Edelman v. California, 344 U. S. 357, 97 L. ed. 387, 73 S. Ct. 293 8

Eubanks v. Louisiana, 356 U. S. 584, 2 L. ed. 2d 991, 78 S. Ct. 970 6

Hartford Life Insurance Co. v. Johnson, 249 U. S. 490, 63 L. ed. 722 8

Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421 9

Irvine v. California, 347 U. S. 128, 98 L. ed. 561, 74 S. Ct. 381 8

Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299 9

Mutual Life Insurance Co. of New York v. McGrew, 188 U. S. 291, 47 L. ed. 480 9

Norris v. Alabama, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579 ..... 5, 6

State v. Birchfield, 235 N. C. 410, 70 S. E. 2d 5 7

State v. Jones, 242 N. C. 563, 564, 89 S. E. 2d 129 8

State v. Kirkman, 252 N. C. 781, 114 S. E. 2d 633 7

State v. Parker, 234 N. C. 236, 66 S. E. 2d 907 8

State v. Sullivan, 229 N. C. 251, 49 S. E. 2d 458 7

Tarrance v. Florida, 188 U. S. 519, 47 L. ed. 572 6

Thomas v. Texas, 217 U. S. 278, 53 L. ed. 512 6

Worcester County Trust Co. v. Riley, 302 U. S. 292, 82 L. ed. 268 9

FEDERAL STATUTES

28 USCA 1257(3) 2

28 USCA 2101(b) 2

STATE STATUTES

Section 2-42(16) of the General Statutes of North Carolina 5

Section 9-20 of the General Statutes of North Carolina 5

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OPINION BELOW

The Supreme Court of North Carolina filed its opinion in this case on February 1, 1963, and the opinion is reported as 258 N. C. 563; 129 S. E. 2d 229. This opinion appears in the official transcript of the record before this Court, beginning on p. 54. The Supreme Court of North Carolina affirmed the judgment of the Superior Court of Lenoir County, North Carolina, which was entered in December, 1961, and appears in the official transcript of record before this Court, beginning on p. 41. The judgment as to both petitioners is of record in the Office of the Clerk of the Superior Court of Lenoir County and in the Office of the Clerk of the Supreme Court of North Carolina and is not officially reported. This Court granted certiorari on October 21, 1963 (11 L. ed. 2d 110—Advance No. 1, November 11, 1963; 84 S. Ct. 153—Advance No. 1, November 15, 1963).

JURISDICTION

The petitioners invoked the jurisdiction of this Court under the provisions of 28 USCA 1257(3). Since the Court has granted certiorari in this case we do not see how 28 USCA 2101(b), and Rule 22(1) of the Rules of this Court have anything now to do with the matter at all. Nor do we think it is correct to say that this is an appeal from the Supreme Court of North Carolina for the simple reason that this Court has chosen to review the matter upon writ of certiorari.

QUESTIONS PRESENTED

It being admitted by the State of North Carolina that eligible persons of the colored race cannot be systematically and purposefully excluded from their opportunity or chance to serve on the grand jury of the county whose grand jury indicted the petitioners, we, therefore, submit that the proper questions are as follows:

(1) The burden of proof being upon petitioners, is there sufficient evidence that persons of the colored race were purposefully and systematically excluded in the organization of the grand jury which indicted petitioners?

(2) Were the petitioners deprived of any rights guaranteed by the Federal Constitution by the denial of their motion for a mental examination by a competent private psychiatrist?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional provisions and statutes involved in this case are listed and quoted in the Appendix attached to this brief.

SUMMARY OF ARGUMENT

It is the contention of the State of North Carolina that the

evidence of the petitioners is not sufficient to show unconstitutional discrimination in organizing the Grand Jury of Lenoir County when it is made to depend upon the recollection of the Clerk of the Superior Court that only one Negro has served on the Grand Jury during his tenure of 24-years (R. 22). Especially is this true when he himself says it is merely a matter of memory, and when he also says on cross-examination (R. 23) that there have been Negroes on the jury panels in the County and that he does not know of any purposeful or systematic exclusion.

The State of North Carolina will argue that the petitioners having been committed to the State Hospital at Goldsboro for observation and mental examination, and having been examined and a report made thereon, no constitutional right of the petitioners has been violated by the refusal of the Court to continue the case and provide for a mental examination by a private psychiatrist. That this is especially true since the petitioners did not enter any plea of insanty or mental disability, and in the jurisdiction of North Carolina the evidence of lay witnesses as to mental status is competent.

ARGUMENT

A

There is not sufficient evidence of systematic and purposeful exclusion of members of the colored race from service on the grand jury.

A complete transcript of the State record which was before the Supreme Court of North Carolina was certified to this Court by the Clerk of the Supreme Court of North Carolina in the certiorari proceedings (No. 138, Misc., 11 L. ed. 2d 110; 84 S. Ct. 153). In our argument we shall refer to the official transcript of record in this Court as "T.R.", and we will refer to the transcript before the Supreme Court of North Carolina as "S.R.".

The total evidence before this Court as to jury discrimination consists of the evidence of the Tax Supervisor showing that the total amount of the tax abstracts of the County for the white race are 12,250 and the total amount of abstracts for the colored race are 4,819. The white polls listed—between the ages of 21 and 49—are 5,583 for white and 2,499 for the colored. Payment of poll taxes is not a requisite for jury service in North Carolina and has not been for many years. The next evidence for the petitioners is that of the Clerk of the Superior Court, who had held office for about 24 years, and who testified that he could not remember but one colored person serving on the grand jury (T.R. 22). This evidence was given to the best of his recollection. He further testified that another colored person appeared on the grand jury but happened to be a resident of another county. He further testified (T.R. 23) that Negroes had not been systematically excluded from grand jury service and that he had seen Negroes among the jury panels in the County and that the largest number he had seen upon the regular jury panel at one time was four or five (T.R. 23). The grand jury for this County is drawn on a staggered term basis; that is, nine new members are drawn at the January Term and nine new members at the August Term. By referring to the Appendix to this brief, and particularly to Section 9-25 of the General Statutes of North Carolina, the Court will see how the members of the grand jury are drawn for Lenoir County. The Clerk explained (T.R. 23) how the grand jurors' names are drawn by having a child under ten-years of age draw the scrolls which are taken from one box, a list made, and then the scrolls drawn are placed in another box. The complete number drawn for the grand jury, as well as the number drawn for the trial panel, are all mixed together and at the opening of Court another child draws the scrolls from a hat and the first nine appearing serve on the grand jury and the balance on the trial panel.

This in summary is all the evidence produced and counsel for the petitioners state in their brief that this is all the evidence "within their power to show." This cannot be true.

as we will now show. Counsel for the petitioners brought out in redirect examination (T.R. 24) that the Clerk had a record for those jurors who had served in the past, and indeed this is true, because Section 2-42(16) of the General Statutes of North Carolina requires:

> "Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours:*** 16. Record of jurors, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed."

It is further provided by Section 9-20 of the General Statutes of North Carolina as follows:

> "The Clerk of the Superior Court shall record alphabetically in a book kept for this purpose the names of all grand and petit jurors and talesmen who serve in his court, with the term at which they serve."

Had counsel for petitioners desired to do so they could have had the jury box produced, the names called of those who had served and their race identified or designated. This was not done. Furthermore, counsel for petitioners could have issued a subpoena and had the jury box brought into Court, the names on the scrolls examined and their race identified. This has been done (BROWN v. ALLEN, 344 U. S. 443, 97 L. ed. 469, 73 S. Ct. 397) where in the opinion of this Court it appears: "The jury box was produced in Court, opened, and counsel for defendant permitted to examine the scrolls." Counsel did not follow the pattern of proof in NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579, by showing that there were members of the colored race in the community engaged in businesses and professions requiring intelligence and were eligible and qualified to serve as grand jurors.

It is unnecessary to discuss the cases of this Court dealing with race discrimination in the selection of grand jurors and trial jurors. The cases are collected in an annotation append-

ed to EUBANKS v. LOUISIANA, 356 U. S. 584, 2 L. ed. 2d 991, 78 S. Ct. 970, and the annotation appears on p. 2040 of the law edition citation. This annotation refers to prior annotations appearing in 94 L. ed 856 and 97 L. ed. 1249.

We do not deny the rule that has been established but we do contend that petitioners are required to produce clear and cogent evidence when a state is being tried at the bar of this Court. The discriminatory conduct that is condemned is "purposeful discrimination" or "long, continued, unvarying and wholesale exclusion of Negroes from jury service" (AIKENS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; NORRIS v. ALABAMA, supra). Proportional representation of races is not required (THOMAS v. TEXAS, 217 U. S. 278; 53 L. ed. 512), and there is a presumption that officers in charge of jury selection perform their duty without discrimination (TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572).

We seriously emphasize that the Clerk of the Court in his evidence never did give the race composition of the grand jury that indicted the petitioners, and the tax supervisor testified that he did not know the race composition of the grand jury that indicted the petitioners but the trial judge stated that he did know because he saw it (T.R. 22). This creates the inference that there were colored persons on the grand jury that indicted the petitioners.

B

There is no constitutional question presented on this record as to the refusal of the Court to continue the case and allow a mental examination by private psychiatrist.

The petitioners make a contention in their brief that they should have been examined by a private psychiatrist, and although the petitioners received a mental examination as provided by the North Carolina statute (See Appendix, Section 122-91 of the General Statutes of North Carolina) the

petitioners seem to contend in some way that the examination was not proper.

This Court will note (T.R. 5, 6) that upon the motion of counsel for the petitioners the defendants were sent to the State Hospital at Goldsboro for observation, and "for the purpose of determining the mental status of said defendant and particularly the degree, if any, of his mental disorder." The Mental Hospital was ordered to file a report and to furnish a copy to the prosecuting officer and to counsel for the petitioners. The contents of the report do not appear in the official transcript of the record of this Court nor did the report appear in the transcript before the Supreme Court of North Carolina. It is assumed, therefore, that the official action in putting the petitioners on trial was correct and that the petitioners were mentally competent. It is noticeable that counsel for the petitioners never did interpose a plea of insanity nor did they allege anywhere that the petitioners were mentally incapable of understanding the nature of the proceedings against them, to make a rational defense and to advise with counsel. In the renewal of motion for continuance (T.R. 8) it was said that the petitioners did not have sufficient mental capacity to understand and realize the charge against them and the effect of a verdict of guilty. This motion is verified by the attorneys for the petitioners. We have been unable to find out what was wrong with the mental examination of the petitioners; this has never been pointed out.

The procedure in North Carolina for trial on the issue of insanity and the issue of whether petitioners are mentally competent to stand trial upon arraignment is pointed out in STATE v. SULLIVAN, 229 N. C. 251, 49 S. E. 2d 458.

Under the North Carolina Practice the petitioners' motions for a continuance was a matter to be determined within the discretion of the trial judge and ordinarily such exercise of discretion does not present a question for review (STATE v. KIRKMAN, 252 N. C. 781, 114 S. E. 2d 633; STATE v. BIRCHFIELD, 235 N. C. 410, 70 S. E. 2d 5; STATE v.

PARKER, 234 N. C. 236; 66 S. E. 2d 907).

If the Court will examine the State record that was before the Supreme Court of North Carolina it will find set out in detail the ruling of the Court on these motions, and on S. R. 15 this Court will see that the trial court found that counsel for the petitioners had had ample time to have their clients examined by a psychiatrist of their own choosing, and the Court then and there offered to counsel an opportunity for petitioners to obtain any private psychiatrist they desired and to have their clients examined at any time during the progress of the trial.

It is noticeable that the petitioners do not cite any constitutional provision which they claim has been violated. Id, furthermore, if this Court will examine the State record or transcript it will find that the petitioners never at any time contended or set up either in the trial court or before the Supreme Court of North Carolina any claim that their constitutional rights had been violated in this respect. An attempt to raise constitutional questions for the first time on an appeal is not approved by this Court (IRVINE v. CALIFORNIA, 347 U. S. 128, 98 L. ed. 561, 74 S. Ct. 381). In IRVINE v. CALIFORNIA, supra, this Court said: "We disapprove the practice of smuggling additional questions into a case after we grant certiorari."

The Supreme Court of North Carolina does not review constitutional questions unless they are properly raised and passed upon by the trial court (STATE v. JONES, 242 N. C. 563, 564, 89 S. E. 2d 129). It is believed that this Court follows the same rule (EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387, 73 S. Ct. 293).

The rights, privileges, or immunities must be set up in the State courts.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722;

KEOKUK & H. MILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480.

The petitioners have set forth the charge of the trial court in the transcript of the record of this Court. We do not know why this was done unless it is an attempt to have some psychological influence on the Court because a substantial error in the charge to the jury in a criminal case does not deprive the petitioners of the equal protection of the laws (DAVIS v. TEXAS, 139 U. S. 651, 35 L. ed. 300). The error of a State court in applying its own laws of its own State is not a denial of due process (HOWARD v. KENTUCKY, 200 U. S. 164, 50 L. ed. 421). The Constitution of the United States does not guarantee that the decisions of state courts shall be free from error (WORCESTER COUNTY TRUST CO. v. RILEY, 302 U. S. 292, 82 L. ed. 268).

CONCLUSION

The Court can examine the facts in the case by looking at the State record which was before the Supreme Court of North Carolina, and the Court will also find a detailed recital of the facts in the Opinion of the Supreme Court of North Carolina which appears in T.R. at pp. 54, 55, 56, 57. The Court will see that this was a malicious, premeditated murder committed in a barbaric manner without any cause or excuse and that the motive was robbery. There is no evidence that the deceased ever knew or ever did anything that could be considered hostile to the petitioners. This was a murder committed in cold blood without a single extenuating circumstance; the petitioners confessed to the crime, and there is no contention that the confessions were improperly secured and are constitutionally invalid.

The State of North Carolina asks this Court to dismiss these proceedings and to affirm the judgment of the State Court.

Respectfully submitted,

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APPENDIX

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 17, Article I, Constitution of North Carolina: No Person taken, et., but by law of land. No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

G.S. 9-1. Jury list from taxpayers of good character: The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year, 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of the names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing

within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

G.S. 9-2. Names on list put in box: The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

G.S. 9-3. Manner of drawing panel for term from box: At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners, may, at the same time, and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case,

and then they shall not be discharged until the trial is determined.

G.S. 9-24. How Grand Jury drawn: The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

G.S. 9-25. Grand Juries in certain counties: At the first fall and spring terms of the criminal courts held for the counties of Columbus, Craven, Cumberland, Durham, Gaston, Guilford, Iredell, Johnston, Lenoir, McDowell, Mecklenburg, Moore, Nash, New Hanover, Pitt, Richmond, Vance, Wake and Wayne, Grand Juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring term, respectively. In the event of vacancies occurring in the Grand Jury of Pitt or McDowell county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

At any time the judge of the superior court presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell and New Hanover counties may call said Grand Jury to assemble and may deliver unto said Grand Jury an additional charge. The said judge presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell or New Hanover counties may at any time discharge said Grand Jury from further service, in which event he shall cause a new Grand Jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the Grand Jury chosen at the first term of the superior court of Cumberland and Lenoir counties for the trial of criminal causes in the year of one

thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one year. . . . . .

G.S. 122-91. Alleged criminal may be committed for observation: Any alleged criminal indicted or charged with the commission of a felony may, on the order of the presiding or residing judge of the superior court, in or out of term, be committed to a state hospital for a period of not exceeding sixty days for observation. The order of commitment shall contain the name and address of the nearest responsible relative, if known, and shall also contain the address of the alleged criminal, if known. If at the end of the observation period herein provided the alleged criminal is found to be mentally incompetent of pleading to the charge against him, the superintendent of the state hospital concerned shall report his findings and recommendations to the clerk of the superior court of the county from which the alleged criminal was committed. It shall be the duty of such clerk to bring the report to the attention of the presiding or resident judge of the superior court who may, on the basis of the report of the superintendent, commit such alleged criminal in accordance with the provisions of G.S. 122-83. If the alleged criminal shall be found competent, the superintendent of the state hospital concerned shall report his findings to the clerk of the superior court of the county from which such alleged criminal was committed and the clerk shall notify the sheriff who shall remove the alleged criminal from the state hospital and return him to the county for trial.